IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IEF OF BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This Brief is submitted, pursuant to Rule 27 (9)(b), by aniff Airways, Inc., Northwest Airlines, Inc., and Trans orld Airlines, Inc., as *amici curiae* in support of the ition for a writ of certiorari filed by the Civil Aeroutics Board. Each of these carriers holds certificates of blic convenience and necessity issued by the Civil Aeroutics Board authorizing them to engage in both interte and foreign air transportation.

The decision of the Court of Appeals for the District of lumbia Circuit relates to a decision of the Civil Aeroutics Board fixing final rates of mail compensation to

be paid to Chicago and Southern Airlines, Inc., for services provided over its international routes.[1] The Court held that the Board was required by the Civil Aeronautics Act to offset against the carrier's mail pay need on its international services any so-called "excess" profits earned by it on its domestic routes. Although the rates established by the Board are applicable only to Chicago and Southern and to the services provided by it over its international routes, the Postmaster General has made it known that he will urge that the decision of the Court of Appeals for the District of Columbia Circuit be applied to the domestic and international services provided by the *amici curiae*.

Important considerations of public interest and national policy in the field of air transportation are directly affected by the disposition made of the issues in this case. Such issues warrant review by this Court.

REASONS FOR GRANTING THE WRIT

I

The Effect of the Decision of the Court of Appeals on the Air Policy of the United States Government With Respect to International Air Transportation.

The present system of international air transportation operated by United States air carriers was created pursuant to a National air policy. This National air policy and the system of international air services created pursuant thereto are placed in jeopardy by the decision of the Court of Appeals.

Prior to World War II, a single United States air carrier operated this country's entire system of international air services (other than transborder operations into Canada). Technical advancements in aviation arising out of the War foreshadowed a very substantial expansion of commercial air transportation with the coming of peace,

[1] Chicago and Southern Airlines was merged into Delta Airlines on May 1, 1953.

particularly in connection with international air services, and it was recognized that this Government would then be faced with important questions of National air policy. Should the existing protected monopoly system be continued or should a system of competitive international air routes be created? Should carriers operating domestically be permitted to expand internationally, or should new companies be developed to provide competitive international services? These questions touched upon considerations of national defense, as well as upon considerations of foreign commerce.

Accordingly, exhaustive study of future policy with respect to international air transportation was undertaken early in 1943 by the Civil Aeronautics Board, the War Department, the Navy Department, the Department of State, the Post Office Department and the Bureau of the Budget. Interdepartmental working committees were set up to review the problems and to report to the various Departments and to the President. From this there evolved in 1944 a unanimous policy determination that the National interest required that United States international air routes should not be operated by a single United States air carrier, a so-called "chosen instrument," but that several United States air carriers should be authorized to operate in this field.

The considerations of National interest which lead to this policy determination are set out in detail in two decisions of the Civil Aeronautics Board, *American Export Airlines, Trans-Atlantic Service,* 2 C.A.B. 16, and *Northeast Airlines, et al., North Atlantic Route Case,* 6 C.A.B. 319, and also in testimony and reports presented by interested Government agencies at Congressional hearings on the subject, *Hearings Before the Subcommittee on Aviation of the Committee on Commerce, United States Senate, 79th Congress, 1st Session, on S. 326; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on Bills Rela-*

tive to Overseas Air Transportation; and *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Congress, 1st Session, on S. 987.* Each of the foregoing Congressional hearings involved legislation proposing that the United States should authorize only a single air carrier to operate this country's system of international routes. None of these bills was favorably reported.

This policy of competitive international air services was implemented by the Civil Aeronautics Board, with the approval of the President, by the issuance of certificates for international routes to a number of different United States air carriers. In the case involving routes across the North Atlantic the Board determined as a matter of policy that there were important advantages to the National interest in authorizing United States *domestic* air carriers to operate a part of this country's system of international air routes. This policy decision was approved by the President and was followed in later cases involving the establishment of other competitive international air services.[2]

Following the formulation of this National air policy and its implementation by the Civil Aeronautics Board and the President in a series of cases where certificates were awarded to domestic carriers authorizing them to engage in international transportation, the entire subject was reviewed in 1948 by the President's Air Policy Commission. After lengthy hearings and consideration, the Commission concluded:

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[2] TWA, a domestic air carrier, was issued a certificate for routes across the North Atlantic to Europe and to Africa and beyond to the Orient. Braniff Airways, a domestic air carrier, was issued a certificate for a route from the United States through the Caribbean and down the West coast of South America to Rio de Janeiro and Buenos Aires. Northwest Airlines, a domestic air carrier, was issued a certificate for routes from the United States across the North Pacific to points in Asia. Chicago and Southern Air Lines (now Delta), a domestic air carrier, was issued a certificate for routes from the United States to Caribbean points and the North coast of South America.

"We agree with the present Civil Aeronautics Board policy which favors limited competition among American operators on international routes. We have studied the testimony before the Interstate and Foreign Commerce Committee of the House of Representatives in the Spring of 1947, in which both sides of the issue were exhaustively presented. The Commission has also heard testimony from those advocating one international air line instead of a number of lines operating abroad.

"Some forecast that we shall carry less and less international traffic through inability to compete with low-cost, heavily-subsidized, foreign air lines and that we shall be driven from the skies, as our Merchant Marine was once driven from the sea. We do not agree with this pessimism. We believe that our international operators should receive such Government aid as will permit them to compete effectively with their foreign rivals. American technical and managerial ability, plus the spur of competitive effort, should win for them a substantial share of the world's traffic. The policy of regulated competition that has assured the development of our domestic air lines should be followed in our international system. Present competition seems only adequate to provide the desired incentive to management and a yardstick for comparison between American carriers."[3]

The decision of the Court of Appeals for the District of Columbia Circuit places in serious jeopardy the continuance of this long-standing and carefully developed policy of the Government with respect to the framework of its international air transport system. To require, as the opinion of the majority requires, that domestic earnings of an air carrier be offset against international losses will weaken, if not destroy, the incentive of the air carrier operating both international and domestic services to continue operating international services because of the resultant

[3] "Survival in the Air Age", A Report by the President's Air Policy Commission, January 1, 1948, pages 118-119.

adverse effect on its competitive status in the domestic field.

Domestic carriers which operate international routes are engaged in vigorous competition domestically with air carriers who are engaged exclusively in domestic air service and whose domestic earnings would not be subject to offset against international losses. Under the Court of Appeals' decision equality of competitive opportunity among domestic air carriers would be severely prejudiced, if not eliminated, if one group of domestic air carriers, which also happen to operate international services, are subject to the offset made mandatory by the Court's decision and thereby rendered incapable of maintaining the same level of domestic earnings as its competitors who do not operate international routes.

In such a situation an air carrier operating domestic service would be reluctant to enter the international field for fear of jeopardizing its competitive position in the far larger domestic market. Moreover, certain of the existing carriers operating both types of service may be faced with the prospect of withdrawal from the international field in order to maintain their domestic position. Such action, among the carriers best able to provide international competition, would frustrate the National policy of competitive international air services by United States carriers.

The Civil Aeronautics Board in its mail rate proceedings has classified the international and domestic air services of a single air carrier as different classes of service for rate-making purposes and has treated such services as constituting separate rate-making units. It has not offset earnings between the two classes of service. It has geared its rate-making processes to the preservation of the basic conditions essential to support the established National air policy described above. The Court of Appeals decision states that the Board erred in that respect.

In view of the exhaustive consideration given to the present National air policy and in view of the adverse

impact which the Court of Appeals opinion will have upon the international air transportation system developed by the Board and the President pursuant to that policy, the decision of the Court of Appeals should not be permitted to stand unless affirmed by the Supreme Court.

II

The Effect of the Decision of the Court of Appeals on the Public Interest in Lower Rates on Domestic Air Routes.

The Court of Appeals decision will prejudice the public interest in lower passenger and cargo rates on domestic air services.

With the substantial increase in the use of air transportation in recent years, it has been possible for a number of domestic air carriers to operate their domestic services at compensatory mail rates and without any element of subsidy. Further increases in the use of air transportation can open the way for reductions in passenger and cargo rates, increases in the volume of air coach services, and other benefits to the public.

However, the offset doctrine advanced by the Court of Appeals would shut the door to these improvements in service to the public at least insofar as such improvements might be made available by carriers who happen to operate both domestic and international services. Domestic earnings of carriers operating both domestically and internationally could not be used for this purpose but would have to be siphoned off first to support the more expensive and less profitable international services.

Passenger and cargo rates must be substantially the same as between competing carriers. For example, Braniff Airways and American Airlines compete with each other on the domestic Chicago-Dallas route. Effective competition would not be possible if Braniff's passenger and cargo rates were higher than American's or if Braniff were unable to match any reduction in rates which American might offer to the public. American operates no system of inter-

national routes (other than trans-border routes) and its domestic earnings are available for possible reduction in rates on its domestic system and for the acquisition of more deluxe equipment or for indulging in other competitive attractions which Braniff could not afford if Braniff's domestic earnings must first be used to off-set losses on its international services. In such an event Braniff is faced with the alternative of operating its domestic services at higher rates than its competitors or of meeting the rate levels and other customer attractions of its competitors and asking the Civil Aeronautics Board to subsidize the losses incurred thereby through mail pay. What has been stated above with respect to Braniff applies equally to Northwest and Trans World, which also compete domestically with carriers whose operations are confined to the domestic field.

III

The Effect of a Court of Appeals Decision on the Board's Ability to Fix "Class" Rates Under Section 406(b) of the Act.

Section 406(b) of the Act, 52 Stat. 998, 49 U.S.C. 486, empowers the Board to "fix different rates for different air carriers or classes of air carriers, and different classes of service". This Court has recognized that a class rate is "an important regulatory device". In *Transcontinental & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601, 606 (1949), the Court said:

> " . . . Thus § 406(b) authorizes the Board to fix rates for 'classes of air carriers'. *It is plain that the uniform rate for the class is an important regulatory device.* For § 2(d) of the Act looks to the sound development of an air transportation system through competition. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs." (Emphasis supplied)

The Court of Appeals decision would destroy the basis for fixing rates by classes and defeat the regulatory advantage derived from a uniform rate.

That can be seen by referring to the method of fixing such class rates. The Board establishes class rates in the domestic field by grouping in one class all of those carriers whose *domestic* routes are comparable. Thus in theory all carriers in the group have the same opportunity, they receive the same incentive, and the relative success or failure of each carrier in the group is dependent on its individual initiative in developing revenue and minimizing expense in its domestic service.

Under the Court of Appeals decision equal opportunity would no longer exist. As a result of the decision, a carrier with both domestic and international routes would have a risk not imposed on other domestic carriers. The domestic route would no longer be a self-contained unit that can be classified as comparable to other purely domestic routes. The relative success or failure of the domestic route under such circumstances would not be the result of the carrier's initiative in its domestic operations but would be diluted by the extent to which the carrier was called upon to make up deficiencies in international mail need.

The effect of the Court of Appeals decision on the ability of the Civil Aeronautics Board to establish class rates can best be understood by reference to the rates now applicable to the carriers appearing as *amici curiae*.

TWA is both an international and domestic carrier. Internationally, TWA is certificated to operate the North Atlantic route to Europe and then onward via various intermediate points as far as China. Rates for the international route are in the process of being established by the Board. In the domestic field it has operated since 1942 under a uniform mail rate for a class of carriers known as the "Big Four". At present, and for some time past, this rate has been a compensatory rate, including no element of subsidy. It is the lowest rate of mail compensation in the air transport industry. This rate has been set on the basis of the characteristics of the carrier as a class and on the theory that the *domestic* operations of this group of car-

riers are comparable. None of the other carriers in the class has an international operation except for certain limited trans-border services which the Board has treated as part of the domestic routes for mail rate purposes. The decision of the Court of Appeals threatens to impose a burden on TWA's domestic route that is not imposed on any of the other members of the Big Four.

Northwest, like TWA, operates a domestic as well as an international operation. Its international route provides service from the United States to the Orient via Alaska. However, Northwest is not in the Big Four class, but in a separate group receiving a compensatory rate, without subsidy, for slightly smaller carriers. The Court of Appeals opinion would subject Northwest to a risk not borne by any of the other domestic carriers with which it has heretofore been classified.

Braniff is also both a domestic and international carrier. Braniff's international service extends south to Latin America. Braniff receives compensatory payments in the same class with Northwest, but in addition requires subsidy payments in order to provide service to the many small unprofitable points on its domestic system. Each receives a "class" rate, but each is different.

The important point is that the grouping of carriers within classes is based on characteristics of the domestic routes operated by these carriers compared with other domestic routes. The necessity of burdening domestic operations with the need for international operations would not only destroy the basis of classification followed by the Board, but would also destroy the purpose of classification; namely, the use of the uniform rate as "an important regulatory device" for the development of air transportation through competition. A uniform rate cannot be prescribed where uniform opportunity and risk do not exist.

Under the Court of Appeals decision the Board would lack power to establish truly separate and distinct rates for the different operating divisions of a carrier. A nom-

inal "class" rate for any one division would be subject to readjustment based on the results of another division. Thus, it would no longer be more than a token device and the important regulatory features recognized by the Court would be lost. If, on the other hand, the Board were to attempt to set a rate for the entire systems of any of the carriers appearing as *amici curiae,* the differences would be so great both internationally and domestically that establishment of a "class" rate would be impossible. The destruction of class rates is a question of serious import in a vital industry. Certainly the power conferred by the Act and recognized by this Court as an "important regulatory device" should not be substantially abolished without a clear pronouncement by the Court.

IV

There Will Be Continuing Litigation On These Issues Until the Supreme Court Renders a Final Decision.

The issues involved in the Court of Appeals decision are recurring ones which will arise frequently in varied forms in the future in the Board's day to day administration of the mail-rate provisions of the Act. The important bearing of these issues on the public interest has been outlined above. The decision of the Court of Appeals lays down controlling principles for a continuing administrative course of action in a field of substantial public importance. An authoritative construction of the statute by the Supreme Court should be secured at the earliest possible date.

A substantial divergence of views was expressed by the Justices of the Court of Appeals. Three separate opinions were written, one of them a dissenting opinion. In view of this, it is apparent that future cases involving these issues will be taken to the courts if the Board is forced to proceed with its administration of the Act solely on the basis of the Court of Appeals decision. Other proceedings involving the same issues are now pending before the Board

with respect to other carriers and are subject to Board determination in the near future. Further litigation will undoubtedly arise from these unless the Supreme Court authoritatively settles the issues.

Under the Civil Aeronautics Act it is possible for another carrier to appeal the same issue to a court of appeals for another circuit which might reach the opposite conclusion. If this should occur the carriers and the Civil Aeronautics Board would be involved in complications which might require years to straighten out. Until the matter is settled beyond dispute, the rates to which these carriers are entitled are uncertain, thereby casting a cloud over the financial status of the industry. In addition, if the Act is finally construed as frustrating our established National Air Policy, statutory amendments may be desirable. Thus a decision at the outset by the Supreme Court will determine whether recourse must be had to legislative relief and will, in addition, avoid a needless chain of litigation.

CONCLUSION

Because of the substantial impact of the decision of the Court of Appeals for the District of Columbia Circuit on the public interest, on National air policy, and on the continuing administration of the mail-rate provisions of the Civil Aeronautics Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CONSENT:

The undersigned hereby consent to the filing of the attached Brief filed on behalf of Braniff Airways, Inc., Northwest Airlines, Inc., and Trans World Airlines, Inc., as *amici curiae* in support of the petition for a writ of certiorari filed by the Civil Aeronautics Board.

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